(4)

No. 05-1597

In the Supreme Court of the United States

WILLIAM TUCKER AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CYNTHIA DOLORES TUCKER, A/K/A C. DOLORES TUCKER, FOR C. DELORES TUCKER, DECEASED AND WILLIAM TUCKER,

Petitioners

v.

PHILADELPHIA DAILY NEWS, PHILADELPHIA NEWSPAPERS, INC. and KNIGHT RIDDER, INC., SPORTS & ENTERTAINMENT LITIGATION REPORTER, ANDREWS PUBLICATIONS, INC., LEGAL COMMUNICATIONS, LTD., THE LEGAL INTELLIGENCER, MERIDIAN VENTURE PARTNERS, LP, BASELINE II, INC., AND THE ENTERTAINMENT LITIGATION REPORTER,

Respondents

REPLY BRIEF AND SUPPLEMENTAL APPENDIX ON PETITION FOR A WRIT OF CERTIORARI

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PENNSYLVANIA SUPREME COURT ORDER AT ISSUE

Public figure plaintiffs may maintain an action for defamation against media defendants "only to the extent that they are able to allege that, before Appellant-newspapers printed the articles, the Tuckers or their representative unequivocally told Appellant-newspapers that their loss of consortium claim did not include a claim that the lyrics damaged their sex lives."

Tucker v. Philadelphia Daily News, 577 Pa. 598, 635, 848 A.2d 113, 136 (2004).

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STATUTES:

Pa. R.Civ.P. 1028 1

REPLY TO BRIEFS IN OPPOSITION OF THE *LEGAL INTELLIGENCER* AND THE *PHILADELPHIA DAILY NEWS*

Contrary to the suggestion of both media newspaper-Respondents, the issue before Your Court is not one of local pleading requirements. Pa. R.Civ.P. 1028 provides the manner for testing the legal sufficiency of a Complaint, before an Answer is filed. The text of Rule 1028 is attached hereto, as Supplemental Appendix 175a.

The actual malice standard for defamation cases involving public figures and media defendants was set by Your Court as a matter of federal constitutional law. In 1964 the landmark decision in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) changed the course of defamation law, when Your Court first determined that the First Amendment limits state law remedies and prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The *New York Times* actual malice standard was extended to defamation actions brought by public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), *reh. denied*, 389 U.S. 889, 88 S.Ct. 11, 19 L.Ed.2d 197 (1967).

The Pennsylvania Supreme Court's discussion of actual malice in the context of Mrs. Tucker's Complaint against the *Philadelphia Daily News* and the *Legal Intelligencer*, which discussion begins at 577 Pa. at 621, 848 A.2d at 1127, tracked the actual malice analysis used by the Third Circuit in the

case of *Tucker v. Fischbein*, 237 F.3d 275 (C.A.3 (Pa.) 2001). Importantly, *Tucker v. Fischbein* was before the Third Circuit on motion for summary judgment, after pleading and discovery were completed. Instantly, the *Philadelphia Daily News* and the *Legal Intelligencer* have not answered the Complaint, and there has been no discovery.

Unlike the Third Circuit, the Pennsylvania Supreme Court concluded its discussion of actual malice by determining that there is only one way that public figure plaintiff can establish actual malice required under Your Court's *New York Times* decision, *i.e.*, "before Appellant-newspapers printed the articles, the Tuckers or their representative unequivocally told Appellant-newspapers that their loss of consortium claim did not include a claim that the lyrics damaged their sex lives." *Tucker v. Philadelphia Daily News*, 577 Pa. 598, 635, 848 A.2d 113, 136 (2004).

Contrary to the Statement of the Daily News at p. 5, on remand the Tuckers' Amended Complaint pleaded additional facts, notably that Mrs. Tucker told a reporter from the Daily News that she would file suit in response to the reporter's reading to her of Tupac Shakur's lyrics, and that plain text of the articles expressed the disbelief of the quoted source, Fischbein, in the defamatory matter asserted. However, the Pennsylvania Supreme Court has determined that as a matter of federal law, the Tuckers, have not pleaded actual malice.

Contrary to the Statement of the *Daily News* at pp. 5-6, the trial court dismissed and Superior Court affirmed, not because the Tuckers did not plead actual malice, but because the Tuckers did not plead the magical language contained in the Supreme Court's earlier holding.

Contrary to the Argument of the *Philadelphia Daily News* at p. 1, and the *Legal Intelligencer* at p. 1, Petitioners are

indeed contending that the Pennsylvania Supreme Court has decided an important question of federal law in a way that conflicts with relevant decisions of Your Court's regarding the actual malice standard, Supreme Court Rule 10.(c). There is no distortion as suggested by the *Legal Intelligencer* at p. 1 of its Brief in Opposition.

Contrary to the *Legal Intelligencer's* suggestion at p. 2 of its Brief in Opposition, Petitioners pleaded many allegations that support an inference of actual malice. App. 113a *et seq.*, Pet. 4-7.

Contrary to Argument of the *Daily News* at pp. 6-7, the Pennsylvania Supreme Court did not apply the law of *New York Times* and subsequent decisions of Your Court regarding actual malice in a defamation action by a public figure against a media defendant.

Neither the *Philadelphia Daily News* nor the *Legal Intelligencer* has raised a serious objection to Your Court's jurisdiction to review this question of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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Date: August 4, 2006

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PROOF OF SERVICE

I, Richard C. Angino, Esquire, hereby certify that I have this 4th day of August, 2006, served three true and correct copies of Reply Brief on Petition for Writ of Certiorari to the United States Supreme Court by sending same by United States first-class mail, postage prepaid, to the following.

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I further certify that all parties required to be served have been served.

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Rule 1028. Preliminary Objections

(a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:

(1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;

Note: Of the three grounds available to challenge venue, only improper venue may be raised by preliminary objection as provided by Rule 1006(e). Forum non conveniens and inability to hold a fair and impartial trial are raised by petition as provided by Rule 1006(d)(1) and (2).

See Rule of Appellate Procedure 311(b) for interlocutory appeals as of right from orders sustaining jurisdiction and venue.

(2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;

(3) insufficient specificity in a pleading;

(4) legal insufficiency of a pleading (demurrer);

Note: The defense of the bar of a statute of frauds or statute of limitations can be asserted only in a responsive pleading as new matter under Rule 1030.

(5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;

(6) pendency of a prior action or agreement for alternative dispute resolution;

Note: An agreement to arbitrate may be asserted by preliminary objection or by petition to compel arbitration pursuant to the Uniform Arbitration Act, 42 Pa.C.S. § 7304, or the common law, 42 Pa.C.S. § 7342(a).

(7) failure to exercise or exhaust a statutory remedy, and

(8) full, complete and adequate non-statutory remedy at law.

(b) All preliminary objections shall be raised at one time. They shall state specifically the grounds relied upon and may be inconsistent. Two or more preliminary objections may be raised in one pleading.

(c)(1) A party may file an amended pleading as of course within twenty days after service of a copy of preliminary objections. If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot.

(2) The court shall determine promptly all preliminary objections. If an issue of fact is raised, the court shall consider evidence by depositions or otherwise.

Note: Preliminary objections raising an issue under subdivision (a)(1), (5), (6), (7) or (8) cannot be determined from facts of record. In such a case, the preliminary objections must be endorsed with a notice to plead or no response will be required under Rule 1029(d).

However, preliminary objections raising an issue under subdivision (a)(2), (3) or (4) may be determined from facts of record so that further evidence is not required.

Rule 239.5 requires every court to promulgate Local Rule 1028(c) describing the local court procedure governing preliminary objections. Local Rule 1028(c) shall be published on the Pennsylvania Judiciary's Web Application Portal (http://ujsportal.pacourts.us).

(d) If the preliminary objections are overruled, the objecting party shall have the right to plead over within twenty days after notice of the order or within such other time as the court shall fix.

(e) If the filing of an amendment, an amended pleading or a new pleading is allowed or required, it shall be filed within twenty days after notice of the order or within such other time as the court shall fix.

(f) Objections to any amended pleading shall be made by filing new preliminary objections.

Adopted June 25, 1946, effective Jan. 1, 1947. Amended March 28, 1973, effective July 1, 1973; July 18, 1991, effective Jan. 1, 1992; Oct. 24, 2003, effective July 26, 2004; Dec. 16, 2003, effective July 1, 2004; Nov. 2, 2005, imd. effective.

Explanatory Comment—1973

These identical amendments are self-explanatory.

These subdivisions have heretofore provided that, when preliminary objections are disposed of, the Court is faced with a duty to fix a time within which the next procedural move shall take place, but contained no standard time in the event that the Court failed so to fix a time. The amendment provides that the standard time of 20 days, which appears, throughout the entire pleading chapter, shall become the norm unless the Court fixes some other time.

The amendments have the practical advantage of fixing a standard time in all cases, of relieving the Court of the burden of fixing a time except in special situations, and of removing the ambiguity that would result if the Court disposes of the preliminary objection but overlooks fixing any time for the next procedural step in the action.

Explanatory Comment—1991

See Rule 1017.

Explanatory Comment—Oct. 24, 2003

See Explanatory Comment following Pa.R.C.P. No. 239.

Explanatory Comment—Dec. 16, 2003

See Explanatory Comment preceding Pa.R.C.P. No. 1501.